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Office of Administrative Law Judges
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Issue Date: 29 March 2004

Case No.: 2001-LHC-02340

OWCP No.: 13-031267

In the Matter of:

Alberto Games,
Claimant

v.

Todd Shipyard Corp.,
Employer/Respondent, and

Travelers Property & Casualty Corp.,
Carrier/Respondent

Appearances: William Saacke, Esq.
For the Claimant

Roger Levy, Esq.
For the Respondents

Before: Russell D. Pulver
Administrative Law Judge

Decision and Order Awarding Benefits

This case arises from a claim for compensation brought under the Longshore and Harbor Worker's Compensation Act, as amended, 33 U.S.C. §901 ("the Act"). The Act provides compensation to certain employees (or their survivors) engaged in maritime employment for occupational diseases or unintentional work-related injuries, irrespective of fault, occurring on the navigable waterways of the United States or certain adjoining areas, resulting in disability or death.

This claim was brought by Alberto Games (Claimant) against Todd Shipyard Corp. (Employer/Respondent) and its carrier, Travelers Property & Casualty Corp. (Carrier/Respondent), arising from serious industrial injuries sustained on October 21, 1974. A two ton steel plate fell on Claimant crushing his head and shoulder, in the course of his

employment with Employer. Respondents concede Claimant is permanently and totally disabled and have provided compensation for medical care. However, Claimant now seeks reimbursement for home attendant care provided by his family from the date of injury, in addition to compensation for medical conditions and diseases which have arisen subsequent to his on the job accident.

On, June 5, 2001, the Director, Office of Worker's Compensation Programs (OWCP), referred this case to the Office of Administrative Law Judges (OALJ) for a hearing. The case was assigned to me on January 9, 2003. A formal hearing was held before the undersigned on October 22, 2003 in Long Beach, California, at which time all parties were afforded a full and fair opportunity to present evidence and arguments. Administrative Law Judge Exhibits ("AX") 1-5, Claimant's Exhibits ("CX") 1-14, 17-61, 64, 65, 67-77, and 80-84, and Respondent's Exhibits ("RX") 1-24, were admitted into the record.[1] Alberto Games, Jr., Alina Pacheco, Yelina Martinez, Jorge Games, Adda Games, Hector Chavez, and Dr. Lloyd Gross testified at the hearing. The deposition transcripts of Sally Glade, Dr. Jens Dimmick, Dr. Geoffrey Miller, and Dr. Paul Grodan were accepted into evidence, and the testimony set forth therein was relied upon by the undersigned. The deadline for filing post trial briefs was January 9, 2004 for Claimant and January 26, 2004 for Respondents.

The findings and conclusions which follow are based on a complete review of the record in light of the arguments of the parties, applicable provisions, regulations and pertinent precedent.

Stipulations

The parties stipulate and I find:

1. The Act applies to this claim.

2. An employer/employee relationship existed as between Claimant and Employer during the relevant periods

3. Claimant was injured at Todd Shipyard in San Pedro, CA on October 21, 1974.

4. The injury arose out of and in the course of Claimant's employment with Employer.

5. The claim was timely noticed and timely filed.

6. Claimant is entitled to compensation.

7. Respondents are currently providing compensation

8. Claimant has reached MMI and the injury is permanent and stationary.

9. Claimant is not working and is unable to do any work.

[1] All exhibits submitted by both Claimant and Respondents after the hearing were accepted into evidence, and the information set forth therein was relied upon by the undersigned.

Issues

1. Whether the Games Family Partnership is entitled to reimbursement for home attendant care from the date of injury.

2. Whether Claimant's diabetes, hypertension and coronary problems are related to the industrial accident and whether Respondents are responsible for medical expenses.

3. Whether Claimant should be cleared to undergo the Disk Cure Program at UCLA for orthopedic conditions

4. Whether Respondents should pay for the following: past and ongoing orthopedic care, penile implant, motorized scooter, oxygen, surgery to remove cataracts, form fitting glasses and payment of an outstanding bill to Dr. Morishita.

5. Interest on past due benefits, if any.

6. Assessment of attorney fees and costs.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Summary of the Evidence

Witness Testimony

Mrs. Alina Pacheco

Alina Pacheco, Claimant's oldest child, was 11 years old at the time of the accident. Transcript ("TR") at 256. Following the accident, Mrs. Pacheco missed approximately six months of school to care for Claimant. TR at 256. Mrs. Pacheco assisted with Claimant's personal care by helping him bathe and dress. TR at 256. She took the bus with Claimant to his medical appointments and assisted with translation. TR at 256. Mrs. Pacheco also administered medications, gave back rubs, and cleaned Claimant's eye. TR at 257.

Mrs. Pacheco moved out of her parent's house when she married, but continued to take Claimant to his medical appointments. TR at 265. Due to her own family and job obligations, caring for Claimant was limited to weekends and occasional weekdays. TR at 265.

Mrs. Pacheco testified Claimant frequently went through periods described as being "in crisis", where he would become very upset. TR at 260. Claimant relieved his stress by smoking cigars. Mrs. Pacheco never witnessed her parents abusing alcohol or drugs and could not recall Claimant drinking after the accident. TR at 263.

Before the accident, Claimant never had any pains nor complained about his heart. TR at 260. Claimant's problems began after the accident. TR at 260. Mrs. Pacheco was unaware of one pain Claimant did not complain of, "….I think every piece of his soul hurts, from the top of his head to the bottom of his toes, chest pain included." TR at 261.

Mrs. Pacheco testified assistance and support in caring for Claimant would have relieved a lot of the stress the family suffered in the last 29 years. TR at 266.

Mr. Alberto Games, Jr.

Alberto Games, Claimant's oldest son, was 10 years old at the time of the accident. TR at 97. After school, Mr. Games cared for Claimant while his mother worked. TR at 108. Mr. Games assisted Claimant in walking, eating, bathing, cleaning his eye, administering medications, and transporting Claimant to and from medical appointments. TR at 105-107. Mr. Games testified Claimant lost his ability to learn English, requiring his children to translate for him on a daily basis. TR at 107. Any correspondence received in English or anything of interest was read to Claimant by the children. TR at 109.

Mr. Games testified when Claimant was in crisis he would explode over insignificant issues, verbally abuse everyone, and become physically violent. TR at 115 and 121. In 2001, Mr. Games moved out of the family home for safety reasons. TR at 158. Mr. Games testified Claimant smokes one cigar a day. TR at 136. However, Claimant smokes more than four cigars a day while in crisis. TR at 122. Although, Claimant always had a healthy appetite, food became an obsession after the accident. TR at 123. Alcohol was never consumed by Claimant in large quantities. TR at 124. Mr. Games testified Claimant never had any of these problems before the accident. TR at 121.

Many efforts were made by family members to prevent Claimant from driving, specifically due to his inability to see from certain angles. TR at 157. Rather, the children would take Claimant to his medical appointments so he would not have to drive long distances. TR at 158. Depending on Claimant's state of mind, nobody argued with him if he made up his mind to drive. TR at 158.

Mr. Games testified Claimant lives with daily pain and the family provides around the clock care. TR at 112 and 117. Mr. Games prepared the Games Family Partnership Timeline to portray the home the family lived in, who lived in the home at the time, their respective ages, and the medical care provided. TR at 97-98.

Mr. Jorge Games

Jorge Games, Claimant's youngest son, was 6 years old at the time of the accident. TR at 301. From ages 6 to 17, Mr. Games observed his mother giving Claimant hot baths and applying ice to his back. TR at 303. Mr. Games assisted by applying heat and ice packs to Claimant's back as well as retrieving Claimant's medicine in the middle of the night. TR at 303. Mr. Games dropped out of high school in the 11th grade and moved out of his parent's house at age

17. TR at 303 and 307. Before moving, Jorge provided care for Claimant on a daily basis. TR at 308.

Mr. Games witnessed violence between his parents and at times the violence would turn on him. TR at 302. However, he never observed his father abusing alcohol. TR at 306. Mr. Games testified his mother cared for Claimant so much that she had limited time for him. TR at 302.

Mrs. Yelina Martinez

Yelina Martinez, Claimant's youngest child, was born two years after the accident. Mrs. Martinez's first memory of providing care for Claimant was before kindergarten. TR at 276. Mrs. Martinez gave Claimant his medication, shaved him, and cleaned his eye. TR at 276. Mrs. Martinez rode in the car with Claimant as he drove to doctor appointments, and looked in the side mirror for him because he was unable to see from certain angles. TR at 276. Following Claimant's numerous plastic surgeries, Mrs. Martinez applied ointments, hot and cold compresses to his face and liquefied his food. TR at 276 and 278. She also took Claimant to post-op appointments and the pharmacy to pick up medications. TR at 279. When Mrs. Games worked at night, Mrs. Martinez stayed with Claimant because he had insomnia. TR at 278. Mrs. Martinez dropped out of school in the 11th grade, and for the next five years cared for Claimant on a full time basis. TR at 281-282.

Mrs. Martinez testified when Claimant was depressed he would cry and shake uncontrollably and talk about suicide. TR at 279. The bouts of depression occurred many times in a given year requiring the children to be on suicide watch. TR at 279. She recalls her parents screaming and fighting and as she got older they threw things. TR at 280. Over time, Claimant's periods of crisis have become worse. TR at 280. Recently, Claimant struck Mrs. Martinez when she refused to give him the keys to the car. TR at 286.

Mrs. Martinez moved out of her parent's home when she was 22, but continued to provide care for Claimant while working as a dental assistant. TR at 282-283. Following Claimant's heart surgery in 2002, Mrs. Martinez quit her job and moved back into her parent's home to care for Claimant. TR at 276 and 283. Mrs. Martinez testified it was her desire to provide attendant care for Claimant, and it was Claimant's desire to have a family member do it. TR at 289.

Mrs. Martinez currently works as a dental assistant. TR at 292. While obtaining a limited radiological license in dental school, she received some nursing training. TR at 292-3. Mrs. Martinez is qualified to take x-rays, vital signs, and has assisted in sedation. TR at 294.

Mrs. Adda Games

Originally from Cuba, Claimant and Mrs. Games married in 1960 and arrived in the United States in 1971. TR at 310 and 312. Before the accident, Claimant was very healthy and was chosen to compete as a weightlifter in the 1964 Olympic Games. TR at 313 and 315. Prior to the accident Claimant never complained of arrhythmia or chest pains, was never diagnosed with hypertension, diabetes or a high blood sugar count. TR at 313-4.

While in Cuba, Mrs. Games attended medical school. TR at 319. In the United States, Mrs. Games worked as a nursing assistant at Kaiser Permanente, where her duties included feeding, bathing, and performing tests on patients. TR at 318. She also gave patients back rubs, transferred them to labs when necessary and collected specimen for doctors. TR at 318. While working as a nursing assistant, Mrs. Games was enrolled in a two-year program at UCLA to become a respiratory therapist. TR at 320. After Claimant's injury, Mrs. Games was forced to quit the program with only 6 months left, in order to remain with Claimant in the hospital for his entire 28 day stay. TR at 321.

Following Claimant's release from the hospital, the children stayed home from school for 6 months to care for Claimant. TR at 322. Mrs. Games was unable to take time off from work after the accident because of a recent promotion and her need to provide for her family as the new head of household. TR at 320. When Mrs. Games was not working she cared for Claimant by bathing him, applying ice to his head, helping him get out of bed and walk, and consoling him in the middle of the night when he woke screaming in pain. TR at 323.

Claimant experienced his first crisis shortly after his discharge from the hospital. TR at 332. In September of 2003, the police came to the house after Claimant hit Mrs. Martinez when she tried to give him medication. CTR at 66.[2] Mrs. Games testified that anything can happen when Claimant is in crisis, his actions are unpredictable, "It's like one time he's okay, and the next time he's exploding like a bomb." CTR at 66. Claimant never had violent fits of rage before the accident. TR at 332.

Mrs. Games worked the night shift at Montgomery Ward in commission sales from 1977 until approximately 1981. TR at 343. Mrs. Games provided care for Claimant during the day. TR at 343. If Claimant needed medication, the children would call her at work and Mrs. Games instructed them on what to do. TR at 343. Prior to Claimant's 1981 hearing, Mrs. Games was not working, and was caring for Claimant on a full time basis. TR at 343.

On August 24, 1981, the District Director served a Decision and Order Awarding Benefits advising Mrs. Games to notify Carrier and OWCP in writing of any request for medical or nursing care, or changes in the medical personnel providing such care. CX 17. Mrs. Games testified she complied with the Decision and Order by sending a letter on the day or shortly after the decision was served on August 24, 1981, but misdated the letter as "Agost 17th." TR at 346, CX 17. Two weeks after writing the letter Mrs. Games called Richard Shuford, Carrier's claim examiner, to request nursing care payments. CTR at 8. Shuford explained that Mrs. Games was not allowed to receive any reimbursement for nursing care because she is Claimant's wife. CTR at 9. Mrs. Games testified that she knew the Decision and Order required her to do something more than just call Mr. Shuford, however, after contacting several attorneys she was unable to obtain assistance in collecting compensation. TR at 348.

Mrs. Games contacted Linda Mayer at the United States Department of Labor to obtain the OSHA report of Claimant's accident. TR at 350. Mayer advised Mrs. Games that she was entitled to reimbursement for attendant care. TR at 350. Thereafter, Mrs. Games retained

[2] Continuation of Mrs. Games' trial testimony is "CTR" followed by the page reference.

attorney Luis Lemus. TR at 350. Lemus sent a letter to Carrier demanding reimbursement for transportation and nursing care, including interest, and supplied price requests based on price quotations of other service companies. CX 23. The letter also gave the option of settling for $4 million dollars. CX 23. Mrs. Games testified she did not retain an attorney from 1981 to the time she attained Lemus because of the representations of Shuford. TR at 351.

In 1984, Mrs. Games began working at U.S.C. Medical Center as a nursing attendant, but was soon promoted to EKG technician. TR at 33. All of Mrs. Games' jobs required her to read and write English. TR at 32. Five years after the hearing, Mrs. Games continued to administer Claimant's medication, stayed with him all night while he was in pain, applied ice packs on his head, heat packs on his back, and ran tests for blood sugar. TR at 349. When Mrs. Games was not working she was caring for Claimant. TR at 350.

Following the accident Claimant developed serious medical conditions and diseases. TR at 358. Carrier's refusal to pay for Claimant's medical treatment resulted in the accumulation of unpaid medical bills. Carrier has paid for Claimant's oxygen since 1979 but suddenly ceased payment. TR at 358-359. Since the accident Claimant has developed blurred vision. TR at 331. A month after his release from the hospital Claimant experienced problems getting an erection, a problem that became progressively worse. TR at 341. Mrs. Games believes Claimant would benefit from a penile implant. TR at 19.

Mrs. Games testified Claimant will benefit from the use of a motorized scooter because it will enable him to go anywhere she goes. CTR at 19. Dr. Larson, Claimant's treating physician, prescribed an electric scooter for Claimant. TR at 355. However, Claimant was unable to get the scooter because Carrier was unwilling to pay. TR at 355. Additionally, if Claimant gets the glasses he needs for his vision, he will be able to safely operate a motorized scooter. TR at 21. The family will provide constant supervision while Claimant operates the scooter. TR at 21.

Claimant first experienced severe chest pain three weeks after his discharge from the hospital. Shortly thereafter, Claimant's heart problems increased as he complained of shortness of breath and chest pain. TR at 327. In 2002, Claimant had surgery after suffering a heart attack. TR at 359.

Claimant's orthopedic problems qualified him for spinal cord injection treatment from U.C.L.A.'s Institute of Neurological Science, but Carrier refused to pay. TR at 356.

Mrs. Games has suffered psychologically since Claimant's accident. In 1981, Mrs. Games began psychiatric treatment at the U.C.L.A. Medical Center. CTR at 48. Mrs. Games told her doctors that bad people were out to get her family and that she had contemplated suicide because of her situation. CTR at 48-49. Mrs. Games left Claimant for approximately a month and took two of the children with her. CTR at 54. Mrs. Games was hospitalized for a month for depression. CTR at 55. During one of Claimant's violent outbursts, Mrs. Games sought refuge at a battered women's shelter for one week. CTR at 63. In 1994, Mrs. Games was hospitalized for four days because of delusions that her neighbors were trying to kill her. CTR at 56. Mrs. Games testified she has seen Kaiser physicians continuously since 1994.

Mrs. Games was on temporary total disability from August 1997 to October 1999. CTR at 44. However, even while on disability Mrs. Games provided the same care for Claimant since the accident. CTR at 18-19. Claimant rejected Carrier's offer to provide a home attendant care provider because of his discomfort with strangers in his home. CTR at 64-65. Claimant feels more comfortable being taken care of by a family member. CTR at 65. Mrs. Games is not working right now because of knee problems. CTR at 73.

Hector Chavez, RN

Chavez, a nurse care manager with an Associate Degree in Professional Nursing, has worked in the worker's compensation field since 1980. TR at 180. Chavez was referred to this case by Sally Glade. TR at 180.

On September 25, 2003, Chavez met with Claimant, Mrs. Games and Mrs. Martinez to assess Claimant's status, current treatment, and to conduct an on-site assessment of the home situation. CX 85. They discussed Claimant's most pressing problems and concerns which included the need for psychiatric and psychological intervention, severe headache pain, balance problems, shortness of breath and neck and back pain. CX 85.

In his October 21, 2003 accompanying report, Chavez noted Claimant needed assistance with dressing, bathing, meals, money handling, driving, medication administration and supervision. CX 85. Chavez opined additional services are necessary, including psychiatry and psychological treatment. CX 85. Additionally, the home care arrangement where Mrs. Games is the primary care giver should provide for relief support at least two days per week, as the break in care giver duties would lessen the stress on the relationship while affording Mrs. Games with time to herself. CX 85.

Chavez testified a motorized scooter is necessary so Claimant can join the family on community outings. CX 85. The necessity of the scooter is a quality of life issue. TR 181-2. Claimant's ambulatory tolerance is limited to approximately five minutes, after which he may experience shortness of breath. Claimant has problems with stamina and unsteadiness, all of which are well-documented in medical reports. TR at 182. The ability of Claimant to get out of his home and into the community to enjoy outings with his family will help treat his depression. TR at 182. It is important that Claimant have a scooter to be able to do that; otherwise, Claimant is left behind. TR at 182-3. Where the use of a wheel chair will make Claimant more dependent, a motorized scooter will promote Claimant's independence and increase his emotional well being. TR at 190.

Dr. Lloyd Gross

Dr. Gross is board certified in Internal Medicine and Cardiovascular Diseases. TR at 196.[3] Although, Dr. Gross did not examine Claimant he reviewed his medical records at the request of Respondent. TR at 198-99. Dr. Gross testified Claimant's medical problems include the development of diabetes, hypertension, impotence, coronary artery disease resulting in aorta

[3] Dr. Gross is presently retired from the active clinical practice of medicine but maintains his license to practice. TR at 195. While active, 80% of his practice was devoted to cardiovascular matters. TR at 197.

coronary bypass surgery, obesity, history of smoking, moderate alcohol use and psychiatric behavior abnormalities. TR at 201.

Dr. Gross noted Claimant developed adult onset diabetes mellitus three years after his industrial injury. RX 19 at 299. Because the onset of diabetes occurred three years later, Dr. Gross testified there is no way the diabetes has any relationship to Claimant's original injury. TR at 217. Likewise, Claimant's heart disease occurring approximately sixteen years after his industrial injury cannot be connected to the injury as the causes of the disease are completely unrelated. RX 19 at 299. The risk factors for development of heart disease in Claimant's case include diabetes, tobacco use, obesity, and hyperlipidemia. RX 19 at 299. Additionally, people with diabetes develop early, more severe, and more progressive and aggressive coronary disease, than people without diabetes. TR at 204. Dr. Gross was not aware that Claimant suffered severe chest pains two and half months after the accident. TR at 237.

Approximately 22 months after Claimant's accident, hypertension appeared. TR at 205. Claimant's risk factors for hypertension include his obesity, alcohol abuse, tobacco use, subsequent diabetes and eventual vascular disease, all of which Dr. Gross opined provided the real causes for this disorder. RX at 299. Therefore no connection can be made between Claimant's hypertension and his original industrial injury. TR at 206.

Based on his experience and research in the field, Dr. Gross testified that stress has never been mentioned as any kind of important etiology in the development of cardiovascular disease. TR at 224. Dr. Gross does not believe acute stress can cause a myocardial infarction or a permanent alteration of the course of the development of diabetes. TR at 215. The fact that the onset of hypertension occurred 22 months following the accident tells him that this is just part of the natural history of the disease. TR at 217. Dr. Gross came to the same conclusion regarding Claimant's diabetes, from the fact that the onset of diabetes occurred three years later. TR at 217.

Absent the 1974 accident, the cause of Claimant's internal medical conditions are largely genetic and attributable to certain life habits; smoking, alcohol abuse, age, and obesity. TR at 212. There is no definite relationship between the accident and any of the disorders described. Furthermore, Dr. Gross does not see how the accident or its sequelae has caused, aggravated or accelerated any of the conditions described. TR at 213.

Claimant's erectile dysfunction is vascular in nature, resulting from cardiovascular disease and diabetes, rather than nerve damage or emotional problems. TR at 209. Dr. Gross testified he would be very reluctant to recommend penile surgery in a 65 year old man. If the risk is greater than the benefit, it is probably not a good decision. TR at 210. Complications include infection and diabetics seem to handle infection less well than non-diabetics as their resistance to antibiotics seems to be greater. TR at 210. Dr. Gross recommends medicine and other non-invasive approaches be taken first. TR at 211. For example, a new medication for erectile dysfunction allows for better circulation through those arteries and it has "very very good results." TR at 248. It can be used several times a week and requires a single injection. TR at 248.

Claimant's cataracts have no relationship to the original industrial injury, particularly if Claimant's cataracts are due to the adult onset of diabetes, which has no connection to the original industrial injury. RX at 299.

Sally Glade, R.N., C.C.M.

Glade, a registered nurse for thirty-three years, started her own business in 1988 as a medical case manager and life care planner. Dep. at 6. As a nurse case manger Glade familiarizes herself with a patient's medical situation, family and work setting, and meets with physicians to determine their role in the patient's care. Dep. at 6. Next, Glade works with the physician to organize and coordinate a plan of care to ensure the patient's care is given appropriately. Dep. at 6. Additionally, Glade specializes in catastrophic injuries and has a background in pricing attendant care needs for the duration of her patient's lives. Dep. at 16.

At Respondents request, Glade was Claimant's nurse case manager from June 12, 1998 until approximately July 2, 1999. Dep. at 5-6.[4] Glade described Claimant's injury as catastrophic because of the injury to his brain. Dep. at 41. Glade was aware that Mrs. Games was providing all of Claimant's care, including assisting him with his medications and transporting him to medical appointments. Dep. at 9. Glade testified this was necessary for Claimant since he would not tolerate someone else in the house, even if part-time. Additionally, the care provided by Mrs. Games was adequate except for her inability to prevent him from driving and caring for Claimant when in crisis. Dep. at 9 and 13, CX 31.

Glade stated the numerous physicians involved in Claimant's care prescribing various medications could cause more difficulty if the medication was not taken properly. Dep. at 15. Glade discovered some of Claimant's medications needed to be refilled and some of the bottles were not labeled and were so faded that she was unable to read the information. Dep. at 19. Additionally, Mrs. Games and Yelina were having trouble organizing Claimant's medications, especially when Claimant was being difficult. Dep. at 20. The Games family has demonstrated that due to Claimant's temper and their inability to maintain his medication administration that they are unable to oversee his care. Dep. at 26.

Based on her meetings with Claimant and his family, and having acted as Claimant's case manager, Glade testified Claimant needs 24-hour supervision. A skilled live-in attendant would cost $150-$225 dollars a day. Dep. at 22. However, a life care plan providing for an eight hour a day attendant and also a live in attendant is reasonable in light of Claimant's needs. Dep. at 17 and 21. Claimant may also be a candidate for a 24-hour residential type setting for people with brain injuries. Dep. at 45. Claimant needs, "Skilled care or a nurse to come in on a frequent basis, maybe daily, to monitor the medication, to make sure that he's taking them appropriately, and that they are being refilled appropriately, he would also need attendant care when Mrs. Games is not available or is not feeling well." Dep. at 21. Therefore, Glade testified a six to eight hour attendant is adequate, because if Claimant required medication or had a crisis in the middle of the night, Mrs. Games was sufficient to provide care. Dep. at 18.

[4] Glade's involvement ceased when Carrier stated they no longer wanted her to be case manager. Dep. at 14.

Glade testified the attendant care currently provided by Mrs. Games is partially the same care that would be provided by a live-in unskilled nurse. Dep. at 24. A 24 hour attendant would assist Claimant dress, administer medication, and help with his balance. Dep. at 41. However, an unskilled attendant is not allowed to work with medication; a skilled nurse would do that. Mrs. Games, on the other hand, is able to administer medication, where an unskilled attendant can only remind Claimant to take them. Dep. at 24.

Glade testified that a motorized scooter would not benefit Claimant because of his vision problems. Dep. at 22.

Dr. Jens Dimmick

Dr. Dimmick is board certified as a specialist in internal medicine. Dep. at 20. As an internist, he specializes in cardiovascular related diseases, people with coronary artery disease, hypertension, implications of those conditions, and myocardial infarctions. Dep. at 20. As a qualified medical examiner 10 to 15 percent of his time is spent performing examinations in connection with Worker's Compensation claims. Dep. at 21.

Dr. Dimmick first examined Claimant on June 6, 2001 and has examined Claimant a total of 13 times. Dep. at 6 and 8.[5] Claimant's most recent examination was on September 17, 2003. Dep. at 9.

Dr. Dimmick testified Claimant suffered a severe injury in 1974, and as a result was in severe pain and incapacitated physically. Dep. at 9. Claimant's diabetes and cardio vascular problems have been aggravated and worsened by his industrial injury. CX 44. The clinical setting is very stressful and as a result of this stress and inactivity, Claimant has become diabetic, developed high blood pressure, gained weight, and become inactive. Dep. at 9-10. Inactivity, weight gain, diabetes, and hypertension are all strong risk factors for the development of atherosclerosis. Dep. at 10. Atherosclerosis incurred in the coronary arteries can lead to heart attacks or the need for heart surgery. Dep. at 10. Claimant's need for bypass surgery was necessary because of the atherosclerosis in his coronary arteries as a complication of his injury, and the heart surgery followed as a necessary treatment for his industrial accident. Dep. at 14.

Additionally, Claimant's erectile dysfunction is a result of atherosclerosis. Dep. at 10.[6] When atherosclerosis infects the penis or other organs those organs do not function properly. Dep. at 10. Claimant is in need of a penile implant because medications have apparently been unsuccessful. Dep. at 16. Furthermore, Dr. Dimmick sees no reason why Claimant could not withstand the procedure from a cardiovascular or internal medicine point of view and testified that the statement that surgery on patients with severe diabetes is not advisable because of risk for infection is inaccurate. Dep. at 32; CX 51. Rather, it is a caution, but it does not mean you do not do it. Dep. at 32.

[5] Claimant's attorney requested that Dr. Dimmick take over the management of Claimant's internal medical problems. Dep. at 7.

[6] Dr. Dimmick testified Hypertensive medication can cause impotence, but not in this case. Dep. at 37.

Claimant's hypertension is the result of the industrial accident as chronic stress leads to chronic high blood pressure. Dep. at 10-11. Additionally, Claimant's diabetes developed after his injury and is attributable to the industrial accident. Dep. at 15. Lack of exercise by itself is a risk factor for diabetes. Dep. at 37.

Dr. Dimmick testified Claimant's cataracts were likely caused or aggravated by his diabetes. Dep. at 33. Moreover, there is no reason why Claimant could not have cataract surgery. Dep. at 16.

Claimant is in need of a motorized scooter. Dep. at 17. The scooter should be a three or four wheel vehicle as opposed to a two wheel because Claimant will be unable to balance a traditional scooter. Dep. at 17. Claimant's vision does not preclude him from operating a small three or four wheel scooter, however, he certainly cannot operate an automobile. Dep. at 17.

In his November 10, 2001 report, Dr. Dimmick noted Claimant had a registered nurse coming once a week to check his blood pressure, blood sugar and set up his medication for the week. Dep. at 27. Dr. Dimmick opined Claimant needs attendant care even more today because he is in congestive heart failure and is less mobile. Dep. at 28. Claimant needs someone with him on a 24-hour basis because he is immobile and cannot see or move well. Dep. at 29.

Dr. Geoffrey Miller

Dr. Miller, a board certified orthopedic surgeon since 1981, examined Claimant at the request of Respondent on July 17, 2002. RX 21 at 6-7. Dr. Miller also reviewed sixty-nine sets of medical records. RX 21 at 8. Dr. Miller sees no need for any kind of active orthopedic medical treatment. RX 21 at 15. Dr. Miller could not identify a significant balance problem specifically because of Claimant's ability to drive and he does not use an assistive device on a regular basis. RX 21 at 16-17. Additionally, Claimant's symptoms are so widespread and are reflective of systemic disease, of which he has several, including diabetes, heart disease and hypertension, rather than focal and spinal. RX 21 at 32-33.

Dr. Miller testified that, at least in August of 2002, Claimant was not in need of a motorized scooter. RX 21 at 21. Scooters are not a proper device for patients with memory or brain problems because of the inability to operate them safely. RX 21 at 21-22. Canes or walkers are the proper device for patients with balance problems. RX 21 at 22. A scooter is for those with lower extremity impairments that make them immobile. RX 21 at 22**.** Claimant does not qualify for a scooter because he does not have a lower extremity impairment and does not have a specific spine impairment that affects his lower extremities that would even provide some alternative or indirect lower extremity impairment. RX 21 at 22. Therefore, Dr. Miller testified a scooter has no medical basis in Claimant's clinical appearance. RX 21 at 22.

Even though Claimant's pain has continued in his neck and back since the time of injury, Dr. Miller does not believe the pain is associated with the accident. RX 21 at 32. Dr. Miller noted that two car accidents on September 1, 1989 and July 27, 1991 caused injury to Claimant's neck, resulting in the need for medical treatment. RX 21 at 14. Dr. Miller opines Claimant's two car

accidents since the industrial injury from which he stated he fully recovered, makes the preexisting condition moot in regard to the neck and lower back. RX 21 at 32.

There was no evidence of any acceleration or degeneration, and therefore in this case, Claimant's compression fractures were typical of most, they healed uneventfully. RX 21 at 43.

Based on the review of the medical evidence, Dr. Miller opines the effects of the 1974 accident were diluted by the passage of time and the effects of the two car accidents. RX 21 at 50.

Dr. Paul J. Grodan

At Respondent's request, Dr. Grodan conducted a comprehensive internal medical and cardiovascular examination of Claimant on October 29, 2001. RX 22 at 7. Dr. Grodan also reviewed Claimant's voluminous medical records. RX 22 at 20.

Dr. Grodan testified Claimant's diabetes mellitus does not have any relationship to his industrial injury. Rather, the etiology of Claimant's diabetes mellitus is in part due to his genetics and his history of drinking in his young years. RX 22 at 31. Accompanying the diabetes mellitus are peripheral vascular disease and impotence. RX 22 at 32.

Dr. Grodan stated Claimant should not have penile implant surgery because his diabetic condition makes him more prone to infections. RX 22 at 34. Claimant's condition was absolutely not aggravated or accelerated by the consequences of the October 21, 2974 industrial injury because of the time scale of events. RX 22 at 36. There is an absence of any nexus if it took 25 years for Claimant to get to his current condition. RX 22 at 36. If the injury caused aggravation and subsequent pain and suffering Claimant should have had major complications of diabetes and coronary disease within the first five or six years of injury. RX 22 at 37.

Dr. Grodan testified Claimant's impotence is related to diabetes complications and not the industrial injury. RX 22 at 46. Even though Claimant stated he had been suffering from impotence since the industrial accident, nothing in the medical records subsequent to the accident refer to impotence until a few years later. RX 22 at 47. Where an injury causes impotence it occurs almost instantly. RX 22 at 47. Moreover, Claimant suffers from organic impotence as opposed to psychological, and Viagra is helping Claimant. RX 22 at 49. In his medical report, Dr. Grodan opined Claimant is not a candidate for penile implant surgery, both psychologically or physically. RX 7 at 113. Considering Claimant's emotional instability it would be hazardous to undertake a penile implant. RX 7 at 110. In addition to surgical risks, the implant device itself may have associated complications. RX 7 at 110.

Dr. Grodan testified emotional distress is not a factor for causing coronary artery disease. RX 22 at 51. Rather, emotional distress can aggravate and accelerate coronary disease. RX 22 at 51. One needs to have a baseline heart disease which stress can then add to because the release of adrenaline which raises blood pressure, changes the stickiness of the platelets. RX 22 at 51. The fact that Claimant did not manifest coronary disease when examined in 2001, allows Dr. Grodan to conclude there was no aggravation resulting from the injury. RX 22 at 52. Therefore, it is

evident that Claimant's coronary artery disease followed the natural course of history without any aggravation or acceleration. RX 7 at 109.

In his October 29, 2001 report, Dr. Grodan states there is no question that excessive emotional stress and strain can aggravate and accelerate coronary artery disease, and there is no question that major orthopedic trauma can be stressful. RX 7 at 109. However, it appears that Claimant has adapted fairly well to his impairment and disability and has learned to live with it. RX 7 at 109.

Based on Claimant's examination, observing his movements, activities, behavior, and what he was able to do or not do for himself, Dr. Grodan opined Claimant does not need attendant care. RX 22 at 88-89. There is no indication in the record or on direct exam that Claimant has a disability requiring an attendant to deal with every aspect of his daily living. RX 22 at 89.

Therefore, Dr. Grodan opined that based on the current records it is evident that neither Claimant's heart attack, cardiovascular disease, peripheral vascular disease, diabetes mellitus with neuropathy or the impotence, have any relationship to Claimant's employment or industrial injury. RX 7 at 113.

Medical Evidence

On February 18, 1977, Claimant was examined by Dr. Edward Dickstein. CX 3. In his report, Dr. Dickstein noted the development of hypertension and evidence of probable coronary artery disease. CX 3 and 4. Dr. Dickstein opined Claimant's condition was industrially related as it was aggravated by stress related to the injury, with the concomitant pain and psychiatric symptomatology that developed. CX 3 and 4. In a letter dated April 26, 1977, to Claimant's attorney, Dr. Dickstein noted Claimant's severe pain and shortness of breath. CX 5. Dr. Dickstein opined Claimant's symptoms and complaints were severe enough to require both custodial and nursing care, which was presently supplied by Mrs. Games. CX 5. Furthermore, Mrs. Games should be considered a skilled nursing attendant. CX 5.

On January 27, 1981, Claimant was examined by ophthalmologist Dr. Jose Minaya. CX 12. Claimant complained of severe pain in both eyes and abundant mucus and discharge in the left eye. CX 12. Dr. Minaya opined Claimant was in need of assistance to irrigate and clean his eye on a daily basis. CX 12. Claimant also requires further medical care for his ocular symptoms for the rest of his life. CX 12.

On August 9, 1981, Carrier authorized Claimant's treatment by Dr. Steve Simmons, but limited treatment to internal problems accepted as industrial, namely Claimant's hypertension and heart difficulties. CX 18. Additionally on January 27, 1983, Carrier authorized treatment by Dr. Jack Moshein, for Claimant's orthopedic problems resulting from the industrial injury. CX 19.

On August 21, 1998, at Carrier's request, Doreen Casuto prepared a life care plan for Claimant and researched cost figures for such care. RX 14 at 163. The preparation of the life care plan was based on a thorough interdisciplinary evaluation completed over a three day

period. RX 14 at 168. Casuto stated attendant care is needed to provide supervision, behavioral management, transportation and integration into community programs focused on improving Claimant's quality of life and functioning. RX 14 at 173. Claimant's options include a daily life skills attendant at $15-$17 an hour for six to eight hours per day, seven days per week, with family present ($40,768 per year); live in life skills attendant at $112-$190 per day, without the family present ($55,115 per year); or a residential setting at $4100-$9750 per month if difficulty in providing continuity of care ($83,100 per year). RX 14 at 173.

On November 14, 2000, Claimant was examined by Dr. Prakash Jay. CX 43. Respondents authorized Dr. Jay to conduct additional cardiac diagnostic tests to check for evidence of coronary artery disease. CX 43. In his supplemental report, Dr. Jay opined Claimant's cumulative stress as a result of severe injuries has contributed to aggravation and acceleration of his coronary artery disease as a result of which he has suffered some myocardial damage and has evidence of coronary artery disease. CX 43. Additionally, Claimant's diabetes mellitus had also been aggravated and exacerbated as a result of his work related injuries, evidenced by Claimant's blood tests for glycohemoglobin. CX 43. Claimant's impotence with need for penile implant arose out of his original industrial injury. CX 43. However, Dr. Jay advises against a penile implant, unless cleared by Claimant's treating cardiologist. CX 43.

On March 25, 2002, Claimant underwent an orthopedic re-evaluation by Dr. Daniel Capen. In his medical report, Dr. Capen recommended an electric scooter. CX 39. Additionally, Dr. Capen recommended Claimant participate in the Disk Cure program to help alleviate his chronic pain. CX 39.

Claimant was examined by urologist Dr. Barton Wachs. RX 5 at 24. In his June 4, 2002, accompanying report, Dr. Wachs opined Claimant has an organic erectile dysfunction the bulk of which is due to cardiovascular, hypertensive, and psychological problems. RX 5 at 25. However, Claimant's erectile dysfunction is at least in part related to his work related injury based on psychological factors because of the multitude of medications needed to treat Claimant's depression and other psychological problems. RX 5 at 25. Dr. Wachs opined Claimant's emotional situation is not conducive for complex surgical intervention, especially an inflatable penile prosthesis. RX 5 at 26. Claimant's erectile dysfunction would be best treated by injection therapy, and Dr. Wachs suggests an injection or semi rigid implant rather than an inflatable one. RX 5 at 26.

In August of 2002, Claimant was hospitalized at Glendale Memorial Hospital after suffering severe chest pain, later diagnosed as a heart attack. CX 56. On August 5th, Claimant underwent double bypass surgery for coronary artery disease. CX 56. Dr. Dimmick opined Claimant's heart disease and need for surgery were the logical result of his industrial injury, as pointed out multiple times in the past by various examiners. CX 54. As a consequence, Claimant's heart attack and treatment for the surgery need to be compensated on an industrial basis. CX 54.

Discussion of the Law and Facts

Reimbursement for Home Attendant Care

Section 7(a) of the Act provides that the employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery require. 33 U.S.C. §907(a). Medical expenses may also include an attendant, where such services are necessary because the employee is totally blind, has lost the use of both hands or feet, is paralyzed and unable to walk, or is otherwise so helpless as to require constant attendance. See 20 C.F.R. §702.412(b). Moreover, where an employee's injuries are so severe as to require domestic services, the employer must provide them, even to the extent of reimbursing a family member who performs them. *Gilliam v Western Union Telegraph Co.*, 8 BRBS at 278, 279-80 (1978) (concluding employer must pay Claimant's sister $50 per week for 14 hours of domestic help; *Timmons v Jacksonville Shipyards*, 2 BRBS 125 (1975) (holding wife entitled to reimbursement for providing attendant care after husband injured his back); see *Carroll v. M. Cutter Co., Inc.,* 37 BRBS 134 (concluding employer was responsible for reimbursing Claimant's family members for past 24-hour supervision).

Claimant argues the Games Family Partnership is entitled to reimbursement for home attendant care provided to Claimant since his injury on October 21, 1974. Claimant contends the provision in Judge Karst's decision regarding written requests for medical or nursing care was never intended to apply to Mrs. Games, from whom Carrier had already received notice that she was providing care to her husband and wanted reimbursement. Rather the order was meant for all other outside providers of whom Carrier was not yet aware. However, if there was failure to give proper notice by the Games', Claimant requests this Court to exercise its discretion under 20 CFR §702.422(b), and award the reasonable value of services provided.

Respondents argue they are not obligated to provide reimbursement for past home attendant care prior to October 31, 1997, when a timely request for such care was made according to OWCP regulations and pursuant to the express terms of Judge Karst's decision. Respondents also contend they are not responsible for reimbursement to the Games Family Partnership because Claimant's family members have not been reasonable and appropriate care givers and have not provided for Claimant's best interests.

The undersigned finds Respondents are obligated to reimburse the Games Family Partnership for past home attendant care provided to Claimant. However, reimbursement will commence October 31, 1997, the date on which Mrs. Games complied with Judge Karst's 1981 decision. Judge Karst's decision expressly directed Claimant to notify Carrier and OWCP "in writing" of any request for medical or nursing care, or changes in the medical personnel providing such care. AX 5. The decision also specified mailing addresses to send such requests. AX 5. The decision was signed on August 13, 1981 and served by the District Director on August 24, 1981. AX 5. However, there is no evidence in the record that Mrs. Games complied with the regulations or the decision until October 31, 1997, which is when Claimant's attorney Louis Lemus sent a written request for reimbursement. The only evidence of a written request sent prior to Lemus' letter is a written request by Mrs. Games dated "Agost 17, 1981." Although Mrs. Games

testified the letter was misdated and actually sent on August 24, 1981 or shortly after, the request was not sent to the addresses specified in the decision. TR at 346. The premature date and mistake in address allows the reasonable inference that the letter was not sent subsequent to or in compliance with Judge Karst's decision. Additionally, Mrs. Games' repeated requests for reimbursement by telephone are of no consequence, as the decision expressly directed requests in writing. Thus, because there is no evidence of a written request complying with Judge Karst's decision until October 31, 1997, reimbursement will commence on that date.

Second, Claimant's argument that the terms of Judge Karst's decision did not apply to his family is not persuasive. Judge Karst's decision specifically required Claimant "or those acting on his behalf" to notify Carrier and OWCP in writing of any request for medical or nursing care. AX 5. Claimant's attempt to distort the language of Judge Karst's decision is futile, as the language is abundantly clear. Further, at the hearing on May 18, 1981, Judge Karst repeatedly asked Mrs. Games if there were any other issues. Mrs. Games did not raise the issue of attendant care despite being given multiple opportunities to do so.[7] Therefore, Claimant's argument that Judge Karst decision did not apply to his family is incorrect and reimbursement for home nursing care commences as of October 31, 1997.

Lastly, the care provided by Claimant's family members was reasonable and appropriate in light of the circumstances. First, the 24-hour attendant care by Claimant's family was appropriate because Claimant felt more comfortable being taken care of by a family member. Mrs. Games and Mrs. Martinez both testified that it was Claimant's desire for a family member to provide care and it was their desire to provide such care. CTR at 65; TR at 289. Sally Glade also testified that it was necessary for Mrs. Games to provide Claimant's care because he would not tolerate someone else in the house, even if part-time. Dep. at 9. Second, despite Mrs. Games' longstanding history of physical and psychological problems, and the problems existing in the marital relationship, Mrs. Games nonetheless provided reasonable care for Claimant or made arrangements for his care in her absence. Ms. Glade's testimony supports the contention that Mrs. Games was sufficient to provide care and was giving partially the same care that would be provided by a live-in unskilled nurse, except Mrs. Games can administer medication. Dep. 9 and 24. Dr. Dickstein also opined Mrs. Games should be considered a skilled nursing attendant. CX 5. Additionally, even as minors the Games children were capable of assisting Claimant with his personal care and transportation to medical appointments. Despite Respondent's contention that the Games Family Partnership consisted of unqualified adults and minor children, the Games family, nonetheless, provided full time care. The severity of Claimant's injuries required his family to remain alert at all times when with him, and forced the Games' to surrender their right to come and go at will in order to provide the care for which Respondents are liable. See *Carroll,* 37 BRBS 134. Therefore, in light of the circumstances of this case, the attendant care provided from Claimant's family was reasonable and appropriate.

[7] A hearing in the Games v. Todd Shipyard Corp. matter was convened on May 18, 1981 before Judge Karst. Claimant, Mrs. Games and Alina Pacheco participated in the hearing. At one point in the hearing, Judge Karst called Mrs. Pacheco to the stand where she was asked to assist her parents with certain procedures necessary to obtain the medical care Claimant is entitled to, and she obliged. When given the opportunity to raise any further issues, Mrs. Games never raised the issue of attendant care. CX 15.

Thus, the undersigned finds the Games Family Partnership is entitled to reimbursement for home attendant care provided to Claimant, beginning October 31, 1997.

Calculation of Past Attendant Care

The Games Family Partnership argues it has provided the equivalent of full time attendant care since Claimant's injury, and the care increased over the years due to Claimant's physical deterioration and unstable mental state. Relying on the calculations of Doreen Casuto and David Weiner, the Games Family Partnership requests reimbursement in the amount of $1,105,791, plus interest.

Ms. Casuto has a MRA Degree in Rehabilitation Administration and 28 years of experience in the field of rehabilitation nursing, providing patient care, education and coordination services. CX 74. At the request of the Respondents, Ms. Casuto prepared a Life Care Plan on August 21, 1998. In preparation for her report, Ms. Casuto met with Claimant and his wife, reviewed Claimant's medical records, and relied on the results of Claimant's three day interdisciplinary evaluation. RX 14 at 173. Ms. Casuto estimated that a rate of $15-17 per day is reasonable for attendant care and opined that $40,768 is the total per year for part-time attendant care and $55,115 is the total per year for a full time attendant. RX 14 at 173.

David Weiner is an economist and President of West Coast Economics. West Coast Economics conducts economic analysis, forensic accounting and business valuation. CX 72. Mr. Weiner took the figures from Doreen Casuto's Life Care Plan and ran their present value from October 21, 1974 to November 1, 2003. CX 69. Mr. Weiner then calculated the present value of unpaid attendant care on a full time basis as $1,105.791. CX 69.

After reviewing the evidence, the undersigned finds the Games Family Partnership is entitled to reimbursement for 24-hour care at the rate of $55,115 per year, beginning October 31, 1997. First, evidence in the record establishes that a family member cared for Claimant's needs 24-hours per day. Whether the care was assisting Claimant bathe or dress, transporting him to and from medical appointments or dealing with Claimant's insomnia, caring for Claimant was performed on a full time basis. The testimony of Sally Glade also supports the evidence that Claimant needed 24-hour supervision. Second, $55,115 per year for a full time attendant is appropriate for such care. This figure is based on the calculations of Doreen Casuto, whose opinion is well reasoned, fair minded and is commensurate with both the Claimant's needs and the well being of his family. Therefore, the Games Family Partnership shall receive past attendant care on a full time basis at the rate of $55,115 per year, plus interest, beginning October 31, 1997 until the date on which the undersigned's order of November 3, 2003, which approved the parties' agreement reached at the hearing to commence attendant care by a third party professional was implemented by the Carrier.

Claimant's Medical Conditions

In order for medical expenses to be assigned against the employer, the expense must be both reasonable and necessary. *Pernell v. Capitol Hill Masonry,* 11 BRBS 532, 539 (1979).

The Claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); *Suppa v. Lehigh Valley R.R. Co.,* 13 BRBS 374 (1981). The employer is liable for all medical services arising from legitimate consequences of the compensable injury. Moreover, the medical expenses must be the natural and unavoidable result of the work injury and not due to an intervening cause.

Claimant argues he should receive compensation for medical conditions and diseases which arose after the accident. Claimant contends his diabetes, hypertension, and coronary problems were caused or at least were accelerated and aggravated as a result of the accident. In contrast, Respondents argue they are not obligated to provide treatment for medical conditions that are not related to the compensable injury. Respondents dispute the medical etiology of Claimant's diabetes and hypertension and contend the conditions are genetically caused and/or non-industrial. Likewise, Claimant's vascular diseases are non-industrial as diabetes and hypertension caused and accelerated its development. Based on a careful analysis of the record, the undersigned finds Claimant should receive compensation for his diabetes, hypertension, and coronary problems because they were accelerated and aggravated by the occupational injury.

First, Claimant's industrial injury aggravated and accelerated his diabetes. Dr. Dimmick noted Claimant's diabetes developed as a result of stress and inactivity following the injury. Dep. at 9-10. Based on Claimant's blood tests for glycohemoglobin, Dr. Jay determined Claimant's diabetes mellitus, although non-industrial, was aggravated and exacerbated as a result of his work related injuries. CX 43. While Respondents rely on the opinions of Drs. Grodan and Gross, and argue the etiology of Claimant's diabetes is in part due to his genetics and in part to alcohol abuse, there is conflicting evidence regarding whether Claimant actually abused alcohol and the actual role genetics played in his development of diabetes. On the other hand, the record clearly reflects that following the injury Claimant gained approximately 20 pounds due to inactivity and an apparent obsession with food, and by 1976 weighed approximately 232 pounds. CX 44. Both Drs. Grodan and Dimmick testified that overeating is a common response to stress and depression. In addition, while in crisis, Claimant smoked more than four cigars a day. TR at 122. Claimant's stress, inactivity and obesity, all strong risk factors for diabetes, are undisputed and occurred in response to the industrial injury. Therefore, based on the evidence presented, the undersigned finds Claimant's diabetes was aggravated and accelerated by his industrial injury and Respondents are liable for medical treatment of Claimant's condition.

Second, Claimant's hypertension was also aggravated and accelerated by stress related to his industrial injury. CX 3. Respondents rely on the testimony of Drs. Grodan and Gross and argue there is no connection between Claimant's hypertension and his original injury and that obesity, alcohol abuse, tobacco use, diabetes, vascular disease, and genetics are the actual causes of his hypertension. RX 19 at 209; TR at 206. Dr. Gross testified the onset of hypertension twenty-two months after Claimant's accident reveals that this is part of the natural history of the disease. TR at 205. Dr. Grodan concluded Claimant's hypertension was a result of genetic factors. RX 7 at 114. The undersigned is not persuaded by Respondent's argument because it ignores the role chronic stress and high blood pressure played as a result of Claimant's injury. Evidence of stress and high blood pressure is documented during Claimant's periods of crisis. While in crisis Claimant becomes very upset, and has been known to "explode." TR at 115 and 260. When depressed Claimant often cries and shakes uncontrollably. Furthermore, Claimant never had

violent fits of rage before the accident. TR at 332. Based on the medical evidence and testimony of Drs. Dickstein and Dimmick, stress and high blood pressure played a part in Claimant's development of hypertension making his condition industrially related. Dep. at 10-11; CX 3 and 4. Additionally, the obesity and diabetes risk factors for hypertension mentioned by Respondents were determined industrially related in the preceding paragraph, thereby affirming Respondent's liability.

Third, Respondent's argument that Claimant's coronary artery disease is not industrially related is not persuasive because of the overwhelming evidence of stress contributing to Claimant's condition. CX 3 and 4. Respondents rely on the testimony of Drs. Gross and Grodan who stated Claimant's heart disease is completely unrelated to the industrial injury because the heart disease occurred 16 years after injury. RX 19 at 299; RX 7 at 109. However, coronary artery disease was first detected when Claimant was examined by Dr. Dickstein in 1977. CX 4. Dr. Dickstein noted Claimant suffered from severe pain and shortness of breath, both related to his industrial injury. CX 4. Dr. Grodan also testified that emotional distress is not a factor for causing coronary artery disease; rather it can aggravate and accelerate coronary disease. Dep. at 51; RX 7 at 114. Dr. Gross similarly refutes the effect of stress on Claimant's condition and testified, "Never has stress been mentioned as any kind of etiology in the development of cardiovascular disease. TR at 224.

The judge is not bound to accept the opinion or theory of any particular medical examiner. A judge is not bound to accept the opinion of a physician if rational inferences cause a contrary conclusion. *Todd Shipyard Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Ennis v. O'Hearne*, 223 F.2d 755 (4th Cir. 1955). It is solely within the Judge's discretion to accept or reject all or any part of any testimony, according to his judgment. *Perini Corp v. Hyde*, 306 F. Supp. 1321, 1327 (D.R.I. 1969). Therefore, Dr. Gross' testimony is accorded less weight not only because he never examined Claimant, but because various examiners and evidence overwhelmingly conclude that stress can aggravate and accelerate coronary artery disease. Dr. Dimmick, Claimant's treating cardiologist, opined both stress and inactivity following the accident aggravated and worsened Claimant's cardio vascular problems. Furthermore, Claimant's inactivity, weight gain, diabetes and hypertension resulted in the development of atherosclerosis in his coronary arteries, which was the source of Claimant's heart attack and need for heart surgery. Dep. at 10. Dr. Jay also opined Claimant's cumulative stress from severe injuries aggravated and accelerated his coronary artery disease resulting in myocardial damage. CX 43. Therefore the evidence clearly reflects Claimant's heart disease and need for surgery was in part induced by stress, a logical result of his industrial injury.

Therefore, based upon the foregoing, the undersigned finds Claimant's diabetes, hypertension, and coronary heart disease were aggravated and accelerated by his industrial injury on October 21, 1974, and Respondents are liable for medical treatment.

Miscellaneous Medical Treatment

As mentioned in the previous section, in order for medical expenses to be assessed against the employer, the expense must be both reasonable and necessary. *Pernell*, 11 BRBS at 539. Section 7(d)(1) details when a claimant who has paid his own medical expenses can be

reimbursed by the employer. An employee is not entitled to reimbursement of money which he paid for medical or other treatment or services unless his employer refused or neglected to provide them and the nature of the injury required the treatment and services and employer neglected to provide or authorize them. 33 U.S.C. §907(d)(1).

In *Hunt v. Director, OWCP*, 999 F.2d 419; 27 BRBS 84 (CRT) (9 Cir. 1993), *rev'g Bjazevich v. Marine Terminals Corp.*, 25 BRBS 240 (1991), the Ninth Circuit held that medical providers were entitled to recover interest and attorneys fees where they intervened in a LHWCA proceeding wherein the judge ruled that the claimant was disabled and the treatment the medical providers rendered was reasonable and appropriate under the LHWCA. The Benefits Review Board adopted the Ninth Circuit's position in *Hunt,* holding that interest should be awarded on all past due medical benefits, whether costs were initially born by the claimant or medical providers. *Ion v. Duluth, Missabe and Iron Range Railway Co.*, 31 BRBS 75 (1997).

In the instant case Claimant requests reimbursement for past and on going orthopedic treatment as well as a motorized scooter, penile implant, oxygen, cataract removal, form fitting glasses and payment of an outstanding bill to Dr. Morishita, plus interest.

Ongoing Orthopedic Treatment

Claimant argues the accident and its effects have led to his current orthopedic condition. Claimant requests reimbursement of $300 to the UCLA Medical Group, $3,060 to Dr. Prager for unpaid epidural injections, and payment for future epidural injections. On the other hand, Respondents argue Claimant shows no objective signs of an orthopedic injury. Rather, Respondents contend that Claimant's orthopedic injuries from the initial accident would have healed and resolved within a few years of the accident. RX 21 at 46-47; RX 7 at 112.

The undersigned finds there is substantial medical evidence supporting a real and serious orthopedic injury. As early as 1977, an orthopedic evaluation by Dr. McCowen noted claimant suffered multiple spinal fractures and compression fractures in the low dorsal region representing a permanent disability. CX 6. Claimant continued to suffer from numbness, difficulty walking and pain in his lower back. An MRI in 1997 revealed numerous disk protrusions. CX 26. Dr. Dimmick's July 18, 2001 report noted Claimant is bothered by severe neck and back pains, dizziness, and inability to enjoy himself. CX 45. Dr. Dimmick and Claimant's primary treating physician, Dr. Larson, referred Claimant to the Disk Cure Program at UCLA's Institute of Neurological Research. CX 39. Claimant qualified for the spinal cord injection treatment, and requested pre-authorization, but Carrier refused to pay. CX 39 and 55. Additionally, in 2002, Dr. Capen performed an orthopedic re-evaluation on Claimant and recommended Claimant participate in the Disk Cure Program to help alleviate his chronic pain. CX 39. Claimant paid $300 to the UCLA Medical Group for the initial screening. Therefore, because Claimant requested reasonable and necessary treatment for his orthopedic condition and authorization was denied, Carrier shall reimburse Claimant for all paid and outstanding medical bills, in addition to payments for future Disk Cure treatment and epidural injections.

Motorized Scooter

Claimant argues Carrier should immediately provide him with a motorized scooter, plus interest at 10% from March 25, 2002 for their failure to do so. Initially, Carrier provided a prescription for a motorized scooter but failed to pay for it. While Dr. Miller testified a scooter has no medical basis in Claimant's clinical appearance, both Drs. Dimmick and Capen opined Claimant was in need of a motorized scooter. Dep. at 17; CX 39. However, the most compelling testimony came from Hector Chavez who opined a motorized scooter is necessary because of Claimant's unsteadiness and low stamina, but also because it will allow Claimant to join the family on community outings, which will help treat his depression. TR 181-182. The undersigned agrees with the testimony provided by Hector Chavez and finds that a motorized scooter is medically necessary. Claimant's inability to walk without assistance, unsteadiness and low stamina stem from his industrial injury. Claimant often requires a family member to help him walk and is often unable to join his family on community outings. A motorized scooter will promote Claimant's independence and help treat his depression. However, because this issue does not involve past due medical benefits, interest will not be awarded. Therefore, Carrier shall pay for Claimant's motorized scooter because it is a reasonable and necessary medical expense.

Penile Implant

Claimant argues Carrier should pay for his penile implant surgery, plus interest, resulting from his ongoing penile problems since the accident. The judge has the authority to determine the reasonableness and necessity of a procedure refused by the employer. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991) (Board affirmed judge's order directing employer to pay for Claimant's surgical procedure.)

Both Drs. Gross and Grodan advise against penile implant surgery. Dr. Gross testified the risks exceed the benefits in Claimant's situation because of the high probability of infection. TR at 210. Dr. Gross recommends medicine and non-evasive approaches be taken first. TR at 210. Similarly, Dr. Grodan opined the procedure should not be performed due to Claimant's emotional instability and because his diabetic condition makes him more prone to infection. RX 7 at 110. Dr. Grodan stated Claimant should remain on Viagra as the medicine appeared to be helping Claimant's condition. RX 7 at 110.

Claimant's urologist, Dr. Wachs, recommends injection therapy as the best treatment. RX 5 at 26. Although, Dr. Wachs stated Claimant's erectile dysfunction is in part related to his work injury, he opined Claimant's emotional situation is not conducive for complex surgical intervention, especially an inflatable penile prosthesis. RX 5 at 26.

On the other hand, Dr. Dimmick testified Claimant is in need of a penile implant since medication has proved unsuccessful. Dep. at 16. From an internist point of view, Dr. Dimmick testified Claimant should be able to withstand the procedure. Dep. at 32. Dr. Jay opined Claimant's impotence with need for penile implant arose out of his original industrial injury, and only recommends surgery if cleared by Claimant's treating cardiologist. CX 43.

As there are always risks of complications associated with surgery, the most important issue in the instant case is Claimant's emotional stability. If Claimant's treating psychiatrist believes the surgery will not further impair Claimant's emotional situation, then penile implant surgery shall be granted. Thus, based on the forgoing, the undersigned finds Carrier shall pay for Claimant's penile implant surgery only if approved by the treating psychiatrist.

Oxygen

Claimant argues Carrier should pay to provide oxygen. Claimant has received oxygen from Continental Oxygen Supply since 1979. TR at 358. Carrier initially paid for the oxygen but abruptly ceased payment. TR at 358-9. Carrier's refusal to pay Claimant's oxygen has resulted in the accumulation of unpaid medical bills in the amount of $3,578.60. CX 59. The undersigned finds that Claimant's shortness of breath due to his industrially related coronary artery disease necessitates oxygen supply. Carrier shall pay Continental Oxygen Supply $3,578.60, in addition to all of Claimant's future oxygen needs.

Removal of Cataracts

Claimant contends Carrier should pay to have his cataracts removed, plus 10% interest. Dr. Gross opined Claimant's cataracts have no relationship to the industrial injury and are likely attributed to Claimant's diabetes, which is also not industrially related. RX at 299. On the other hand, Dr. Dimmick testified Claimants cataracts are industrially related because they were likely caused or aggravated by his diabetes, and finds no reason why cataract surgery should not be performed. Dep. at 33. Based on the medical evidence and testimony the undersigned finds that Claimant's cataracts are attributable to his diabetes, which was previously ruled industrially related. Therefore, Carrier shall pay to have Claimant's cataracts removed.

Form Fitting Glasses

Claimant argues Carrier should pay for form-fitting glasses and to have his prescription filled. A result of a two ton steel plate crushing his head and shoulder, Claimant has endured eye problems since the accident. Claimant's family testified to the amount of time spent cleaning his eyes. Dr. Minaya, Claimant's ophthalmologist opined Claimant was in need of assistance to irrigate his eye on a daily basis and required further medical care for his ocular symptoms for the rest of his life. CX 12. Form fitting glasses will not only help Claimant's vision problems but will also help Claimant in the operation of his motorized scooter. Therefore, the undersigned finds it reasonable and necessary for Carrier to pay for Claimant's form fitting glasses and pay to have his prescription filled.

Dr. Morishita's Bill

Claimant argues carrier should pay Dr. Wilson Morishita $535.70 for work performed on an infected implant. The undersigned finds the work performed on Claimant's infected implant was reasonable and necessary, and Carrier shall pay Dr. Morishita $535.70.

Interest on Medical Bills

Consonant with the holding in *Ion v. Duluth, Missabe and Iron Range Railway Co., supra*, interest is hereby awarded on all medical bills which Respondents are ordered herein to pay, whether already paid by Claimant or remain outstanding. Interest is not awarded with respect to any such medical bills that have not yet been incurred such as for the motorized scooter, penile implant, future deliveries of oxygen, cataract surgery, glasses, etc.

Attorney Fees and Costs

In addition to disability compensation, Claimant seeks an award of attorney's fees and costs. According to Section 28(a) of the Act, a claimant who engages an attorney in the "successful prosecution" of his claim may collect a reasonable attorney's fee from his employer. In the instant case, Claimant included a fee petition with his post trial brief (attached as Exhibit 3). Respondents have fifteen (15) days following the receipt of the Decision and Order Awarding Benefits within which to file any objections.

ORDER

Based on the foregoing Findings of Facts, Conclusions of Law and upon the entire record, I issue the following order.

It is therefore **ORDERED** that:

1. Respondents shall reimburse the Games Family Partnership for 24-hour home attendant care in the amount of $55,115 annually, plus interest, commencing October 31, 1997 until the date on which Carrier commenced furnishing third party attendant care pursuant to the undersigned's Order of November 3, 2003.

2. Respondents shall reimburse Claimant for all paid medical bills and shall pay directly all outstanding medical bills related to Claimant's diabetes, hypertension and coronary problems.

3. Respondents shall reimburse Claimant for all paid medical bills and shall pay directly all outstanding medical bills related to his orthopedic condition, in addition to payments for Disk Cure Treatment and epidural injections.

4. Respondents shall pay for a penile implant, only if approved by Claimant's treating psychiatrist.

5. Respondents shall pay for Claimant's motorized scooter.

6. Respondents shall pay Continental Oxygen Supply $3,578.60, and shall pay to provide future oxygen for Claimant.

7. Respondents shall pay to have Claimant's cataracts removed.

8. Respondents shall pay for form fitting glasses and the amount necessary to fill Claimant's prescription.

9. Respondents shall pay the outstanding bills to Dr. Morishita, in the amount of $535.70.

10. Respondents shall pay interest on all medical bills which have actually been incurred and which Respondents are ordered to pay herein, whether already paid by Claimant or remain outstanding.

11. The District Director shall make all calculations necessary to effectuate this decision.

12. Respondents shall continue to furnish medical treatment pursuant to Section 7 of the Act and consistent with this Decision and Order.

A

Russell D. Pulver
Administrative Law Judge